

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1977

NO. **77-1405**

IGNACIO AGUILA RAMOS,

Petitioner

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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Supreme Court, U. S.
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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, Ignacio Aguila Ramos, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 6, 1978.

OPINION BELOW

The Court of Appeals did not render an opinion, having granted judgment against

2.

petitioner on the basis of a motion for summary affirmance of the administrative order for his deportation. The decision of the Board of Immigration Appeals is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1978 and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the crime then defined by former Section 261(1) of the California Penal Code and commonly known as "statutory rape" is a crime involving moral turpitude which subjects petitioner to deportation pursuant to the provisions of 8 U.S.C. 1251(a)(4).

2. Whether, in light of his lawful residence in the United States since he was six years old, petitioner's deportation would deny him due process of law and would result in a cruel and unusual punishment, within the meaning of the Fifth and Eighth Amendments to the Constitution of the United States, respectively.

STATUTES INVOLVED

Former Section 261(1) of the California Penal Code:

3.

"§ 261. Rape defined.

Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of eighteen years;"

* * * *

8 U.S.C. 1251(a)(4):

"§1251. Deportable aliens
General classes.

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who: . . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

STATEMENT OF THE CASE

Petitioner is a native citizen of Mexico, who was admitted to the United States for permanent residence in 1956, when he was six years old. He has lived here ever since. He is married to an American citizen and they have two children who are also American citizens.

In 1970, petitioner was convicted of the crime then known as statutory rape in violation of former Section 261(1) of the California Penal Code. ^{1/} Subject to conviction by that section were male persons who engage in sexual intercourse with a female under the age of 18.

In 1973, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a).

Upon his conviction for the latter crime, the Immigration and Naturalization Service instituted proceedings to deport him from the United States as an alien who, after entry, had been convicted of two crimes involving moral turpitude. 8 U.S.C. 1251(a)(4).

During the deportation proceedings, and in the Court of Appeals below, petitioner conceded that bank robbery was a crime involving moral turpitude but argued that statutory rape was not and consequently that he was not deportable.

The Immigration Judge who conducted petitioner's hearing, the Board of

^{1/} The section has since been revised to rename the same crime as "unlawful sexual intercourse", thus removing the stigma attached to the word "rape".

Immigration Appeals, and the Court of Appeals for the Ninth Circuit all rejected petitioner's argument.

REASONS FOR GRANTING THE WRIT

1. The Moral Turpitude Issue

If deportation is really the drastic sanction this Court has called it, ^{2/} then deportation should be imposed only when there is certainty about its being the intended consequence of clearly proscribed conduct.

There is no doubt, of course, that Congress meant to provide for the deportation of aliens convicted of crimes involving moral turpitude. But there must be serious doubt, in an age of changing moral standards, about the moral turpitude of an offense which can be no more offensive than an act of sexual intercourse between consenting persons.

There are such doubts, and this Court should consider the issue, for the following reasons:

First of all, and however it may be defined, moral turpitude is a concept intended to reflect current standards of morality as measured by the "common conscience" of the community. ^{3/} It has been described as conduct which manifests a "depravity or baseness" by its perpetrator, ^{4/} is "contrary to accepted rules of morality" ^{5/} and "grievously offends the moral code of mankind." ^{6/}

^{2/} Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

^{3/} Iorio v. Day, 34 F.2d 920 (2d Cir. 1929).

^{4/} Mylius v. Uhl, 203 F.152, 154 (2d Cir. 1913).

^{5/} Coykendall v. Skrimeta, 22 F.2d 120 (5th Cir. 1927).

^{6/} U.S. v. Carrollo, 30 F.Supp. 3, 6 (W.D. Mo. 1939).

The flexibility of such a standard, it has been said by the leading writers on immigration law, "apparently evinces a design to accommodate the legislative command to changing norms of behavior." 7/

Second, this is an era of changing attitudes about sexual behavior, even among minors, and even among minors who are female. When as many as 27 percent of the nation's unmarried females can admit to an act of sexual intercourse while under the age of 18, 8/ how can anyone be certain that anything as vague as the community's moral conscience any longer views teen age sex, except hypocritically, as being the vile or depraved conduct associated with moral turpitude?

Third, a crime is a "crime involving moral turpitude" for deportation purposes only if it necessarily, or inherently or in all circumstances includes the element of moral turpitude. 9/ Consequently, if

7/ Gordon & Rosenfield, Immigration Law and Procedure, p. 4-124, 1977 Ed.

8/ M. Zelnik and J.F. Kantner, Sexuality, Contraception and Pregnancy Among Young Unwed Females In The United States, Table 1, in Demographic and Social Aspects of Population Growth, ed. C.F. Westoff and R. Parke, Jr., U.S. Commission on Population Growth and the American Future (Washington, D.C.; U.S. Government Printing Office, 1972), Vol. I, pp.355-374.

Anyone who reads the daily newspapers, popular magazines, or watches television, should be familiar with similar surveys or studies.

9/ Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931) Zaffarino v. Corsi, 63 F.2d 757, 758 (2d Cir.1933). Matter of R—, 6 I.& N. Dec. 444 (Board of Immigration Appeals, 1954).

the vile or evil aspect of the act which constitutes moral turpitude need not be proven to prove guilt, then the crime is never a crime of moral turpitude whatever the perpetrator's state of mind might have been. 10/

But offenses such as statutory rape or unlawful sexual conduct may be proven when the male partner's act is prompted by the most innocent of motives. 11/ To be sure, the act is still a crime on the assumption that an underage female is incapable of consenting to the sexual act. But the classification of crime is one thing. Moral turpitude is another, and moral turpitude, not criminality, is the issue here.

Finally, this Court once recognized a need to determine whether the term "moral turpitude" was unconstitutionally vague when applied to crimes grounded in fraud. Jordan v. De George, 341 U.S. 223 (1951). The consideration which led it to review the issue then -- that deportation, in light of its drastic nature, not be grounded on statutory language conveying less than definite warning of the consequences -- is surely as valid now as it was then.

Having left the issue unresolved in

10/ Zaffarino v. Corsi, *supra*.

11/ For example, a naive 19 years old male could be convicted of statutory rape though seduced by a sophisticated female. So could a young man who made love to his underage fiancée.

"peripheral" cases (341 U.S. at 232), the Court should take another look at the issue when applied to exactly the kind of "peripheral" offense at issue here. For it is only in such cases that doubts about the meaning of moral turpitude remain.

2. The Constitutional Issues

Of all the people who take their cases to the Supreme Court, aliens looking for a constitutional limitation upon the power of Congress to deport them must be among the most persistent, judging at least by the number of times the issue has been unsuccessfully presented before.

It would be presumptuous of this petitioner consequently to suppose he has something to say which the many others before him did not think of. Nevertheless, he asks the Court to consider anew the constitutional issues involved because the stakes are obviously momentous for him, as they would be for others similarly situated, and also because of what seems such an apparent misconstruction of the earliest cases on the subject -- cases which have formed a precedent for all subsequent decisions of the Court -- that the possibility of the Court changing its mind should never be ruled out.

The rule assertedly established by the early cases, sometimes known as the Chinese Exclusion Cases, is that congressional power to exclude and expel aliens comes not from the Constitution but from some kind of extra constitutional concept of inherent national sovereignty. Since congressional power is not derived from the Constitution, it is said, it cannot be limited by the constitution regardless of what might otherwise seem to be a cruel and unusual punishment or an impermissible discrimination

in violation of the Due Process clause.

The cases, however, are faulty precedent for such a rule because they never did say that the sovereign power to exclude or expel aliens came from a source other than the Constitution itself. Moreover, the cases involved the power of Congress to exclude aliens from admission to the country and to expel those who may have entered unlawfully, surely a different matter in current equal protection terms from the banishment of a person who, like this petitioner, was lawfully admitted to the United States as a child, has lived here ever since, and whose deportation would tear him from his American citizen wife and children.

If the early cases then do not really stand for the proposition that congressional power to deport aliens is unrestricted by the Constitution, and petitioner respectfully submits that they do not, then surely the issue merits new and further consideration in light of the brutal punishment deportation will be for him and his family.

The place to begin is at the beginning, with the two cases petitioner has been alluding to -- Chae Chan Ping v. U.S., 130 U.S. 581 (1889) and Fong Yue Ting v. U.S., 149 U.S. 698 (1893).

The first, Chae Chan Ping, involved the right of Congress to exclude Chinese laborers from re-admission to the United States despite their possession of certificates which, pursuant to a treaty with China, were to have insured their return to this country.

The narrow holding of the case is that a subsequent enactment of Congress may

supercede an inconsistent provision of an earlier treaty, and that Congress did have the authority to exclude aliens despite the absence of a specific delegation of power in the Constitution to regulate immigration. The authority to exclude aliens was found to be an incident of national sovereignty. But the important point for purposes of the issue presented here is such authority was viewed as "a part of those sovereign powers delegated by the Constitution ..." 130 U.S. at 609 (emphasis added).

Just why the case should then have come to be cited for an extra-constitutional power to exclude aliens remains something of mystery. One writer has explained it as a confusion between the concepts of inherent sovereign powers and those specifically delegated by the Constitution.

"It is this confusion of the concepts of inherent sovereign powers and delegated powers which underlies the subsequent development of the plenary power theory. All the immigration cases have repeated the same litany of 'sovereign delegated powers,' without acknowledging the contradiction of sovereign but delegated power. A sovereign power, as suggested in the immigration cases, is one whose source is outside the Constitution and therefore not bound by the strictures of the Constitution, whereas a delegated power is one whose source is the letter of the Constitution. In carefully examining the decision, it is apparent that Justice Field himself did not share that confusion of inherent sovereignty and delegated

"powers which was subsequently attributed to his opinion. Justice Field implied a traditional substantive due process restraint when he gave an elaborate justification of the exclusion of the Chinese. His use of the concept of sovereignty then was not to establish an extra-constitutional source of power, but to answer counsel's argument that there was no power to exclude aliens because it was not enumerated in the Constitution. It was simply evident to Justice Field that the essential prerequisite of a territorial nation state is its power to exclude, the power to maintain its borders. To deny to the government the power to exclude aliens 'would be to that extent [to] subject [it to] the control of another.' Thus, The Chinese Exclusion Case can stand for no more than its specific holding — Congress has the power to exclude any class of aliens whose entry it deems injurious to the public good despite earlier treaties or laws to the contrary." 12/

12/ Helbush, Aliens, Deportation And The Equal Protection Clause: A Critical Appraisal, 6 Golden Gate University Law Review, 23, 28 (1975). Other commentators expressing similar views are: Hesse, The Constitutional Status Of The Lawfully Admitted Permanent Resident Alien, 68 Yale L.J. 1578; and 69 Yale L.J. 262 (1959); and Boudin, The Settler Within Our Gates, 26 N.Y.U.L. Rev. 266, 451, 634 (1951)

In the second case, Fong Yue Ting v. U.S., this Court did expand the power to exclude to the power to expel, for it said that:

"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." 149 U.S. at 707

But the forceful language of Justice Gray, writing for the Court as well as the opinions of the dissenting justices obscured the fact that the issues as framed decided little more than the Chae Chan Ping case, for Justice Gray assumed that the aliens involved had been unlawfully admitted to the U.S. As a consequence, their deportation was characterized as a means for removing those who should not have been admitted in the first place. In short, Fong Yue Ting was concerned only with the power to exclude aliens and deport those whose entry was unlawful.

Since Fong Yue Ting did not involve a long term lawful permanent resident, its validity as precedent for cases which did must be questionable at least. Yet all subsequent cases on the subject ultimately fall back on Fong Yue Ting and the concept of inherent, extra constitutional concepts of sovereign powers found in the Chinese Exclusion cases, for the proposition that constitutional attacks on congressional power must fail.

This is true of all of the cases which have turned aside the constitu-

tional arguments. Like a stack of building blocks, they all rest ultimately upon the faulty premises of the old Chinese Exclusion cases. 13/

Hopefully, the foregoing discussion has illustrated the dubious nature of the precedent upon which the Court has acted in the past. But even if the precedent had some validity at one time, it is now 1978. Not so long ago, this Court acknowledged that "much could be said for the view" that the expanding concept of substantive due process "qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens." 14/

At the time, the Court was unwilling to wipe clean the slate on which the doctrine of unlimited congressional power had been written, but for no other reason than the presence of the foregoing precedent cases. At no place in the opinion did the Court critically examine the rationale of the precedent cases themselves.

It is difficult for this petitioner, as it probably is for most laymen, to reconcile with this Court's not infrequent references to the drastic nature of de-

13/ See for example, Galvan v. Press, 347 U.S. 522 (1954) and Harisiades v. Shaughnessy, 342 U.S. 580 (1952), which rely upon such cases as Bugajewitz v. Adams, 228 U.S. 585 (1913) and Shaughnessy v. Mezei, 345 U.S. 206 (1953) which in turn rely upon Fong Yue Ting and the other Chinese Exclusion cases. The recent cases of Fiallo v. Bell, 97 S.Ct. 1473 (1977) and Kleindienst v. Mendell, 408 U.S. 753 (1975) involve congressional power to exclude aliens, not the power to deport long term residents.

14/ Galvan v. Press, 347 U.S. 522 (1954)

14.

portation its apparent unwillingness to reassess the validity of precedent which is said to foreclose it from applying current concepts of equal protection and due process to the deportation of long term, lawfully admitted, permanent residents of the United States, particularly when the weakness of such precedent is so apparent. In light of the harsh consequences that deportation will mean for this particular petitioner, the issue is worth another closer look. This petition should be granted.

Respectfully submitted,

Donald L. Ungar
Attorney for Petitioner

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IGNACIO AGUILA RAMOS, :
Petitioner : NO. 77-1675
vs. : INS #A8-950-970
IMMIGRATION & NATURALIZATION :
SERVICE, : INS N.California
Respondent : ORDER

Before: WRIGHT and HUG, Circuit Judges

Upon due consideration, respondent's
motion for summary affirmance is granted.

s/Eugene A. Wright

s/PROCTER HUG, JR.
United States Circuit Judges

1/3/78

APPENDIX 1

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C.20530

February 13, 1977

File: A 8 950 970 - Los Angeles

In re: IGNACIO AGUILA-RAMOS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Donald L. Ungar Esquire
517 Washington Street
San Francisco, CA 94111

ON BEHALF OF I&N SERVICE: Mary Jo Grotenrath
Appellate Trial Attorney

ORAL ARGUMENT: February 2, 1977

CHARGE:

Order: Section 241(a)(4), I&N Act (8 U.S.C.1251
(a)(4)) - Convicted of two crimes
involving moral turpitude, mainly
statutory rape, and bank robbery

APPLICATION: Termination

The case comes forward on appeal from the order of the immigration judge, dated January 29, 1975, ordering that the respondent be deported to Mexico on the charge under section 241(a)(4) of the Immigration and Nationality Act that he has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: statutory rape and robbery.

The record relates to a married male alien, 27 years of age, a native and citizen of Mexico, who was admitted to the United States for permanent residence in 1956. On January 9, 1970, he was convicted in the Superior Court of the State of California for the County of San Joaquin, for the offense of statutory rape in violation of

APPENDIX 2

section 261.1 of the California Penal Code. 1/ Subsequently, on December 13, 1973, in the United States District Court of Sacramento, California, he was convicted of the offense of bank robbery in violation of 18 U.S.C. 2113A. For the first offense he was sentenced to imprisonment for 15 years for the latter offense.

Under section 241(a)(4) of the Act, an alien in the United States is deportable if, at any time after entry, he has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

The decisions are uniform in holding that statutory rape involves moral turpitude. In Matter of B-, 5 I&N Dec. 539 (BIA 153), we held that it is well established that the crime of rape, being one which inherently reflects depravity, involves moral turpitude, Ng Sui Wing v. United States, 46 F.2d 755 (7 Cir. 1931); Bendel v. Nagle, 17 F.2d 719 (9 Cir. 1927) (carnal knowledge of a female child of the age of 15 years in Maryland, a crime usually classified as rape, the statute simply raising the common law age of consent and manifestly involving moral turpitude); Pino v. Nicolls, 215 F.2d 237 (1 Cir. 1954), reversed on other grounds, 349 U.S. 901 (carnal abuse of female child in violation of Mass. G.L. c. 265, s. 23) Marciano v. INS, 450 F.2d 1022 (8 Cir. 1971), cert denied, 405 U.S. 997 (1972); Castle v. INS, 541 F.2d 1064 (4 Cir. 1976). See also: Matter of Dingena, 11 I&N Dec. 723 (BIA 166); Matter of S-, 2 I&N Dec. 553 (statutory rape in Pennsylvania); Matter of F-, 2 I&N Dec. 610 (BIA 1946) (Illinois Criminal Code, section 37.089 where acts were of the nature commonly referred to as statutory rape); Matter of R-, 3 I&N Dec. 562 (C.O. 1949; BIA 1949); (carnal knowledge in violation of section 201(2) of Criminal Code of Canada would be regarded as statutory rape in the United States and clearly involves moral turpitude); Matter of M-S-, 9 I&N Dec. 643 (BIA 1962) (statutory rape (Texas)).

1/ This provision was in effect at the time of the commission of the crime here involved.

Robbery is a crime involving moral turpitude, Matter of G-R-, 2 I&N Dec. 733 (BIA 1946; A.G. 1947); Gonzales v. Barker, 207 F.2d 398 (9 Cir. 1953), aff'd 347 U.S. 637 (1954).

On appeal counsel argues, inter alia, that "the mores of our community have radically altered so that measured by today's ethical standards, statutory rape is no longer regarded as a crime inherently involving moral turpitude."

We have carefully reviewed the record and find no merit in counsel's argument. As noted above, we have consistently held that statutory rape is a crime involving moral turpitude. We find no reason to depart from that position. We also find that deportability under section 241(a)(4) of the Act has been established by evidence that is clear, convincing and unequivocal, and that the immigration judge properly applied the pertinent legal principles. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

Chairman